In The

Supreme Court of the United States

October Term, 1979

No. 79-478

THE ALMA SOCIETY, INC., ET AL.,

Petitioners,

vs.

IRVING MELLON ET AL.,

Respondents.

On Petition for Writ of Certiorari

BRIEF IN OPPOSITION

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondents, The New York Foundling Hospital and Jewish Child Care Association, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States move that the final judgment of the U.S. Court of Appeals for the Second Circuit be affirmed or, in the alternative, that this appeal be dismissed.

STATUTES INVOLVED

The relevant statutory provisions, New York Domestic Relations Law §114 and New York Public Health Law §4138 are set forth in the Petition on pp. 4a - 7a (fn. 1).

QUESTIONS PRESENTED

1. Is the sealed record feature of the New York adoption laws volative of the Thirteenth Amendment per se, notwithstanding the ability of Petitioners to obtain such information as they seek for good cause shown?

2. Does a substantiel Federal question properly exist for review by this Court?

STATEMENT OF THE CASE

Petitioners are adults, who, having been adopted as children, now seek access to certain

records relating to their birth and adoption. New York statutes provide that these records be sealed and that access to them may be granted upon a showing of good cause. Petitioners claim that such requirement constitutes a violation of the Thirteenth Amendment per se, and that they should have access to such records with no showing of cause whatsoever.

A motion to dismiss the complaint was granted by the U. S. District Court for the Southern District of New York (495 F. Supp. 912). This determination was affirmed by the U. S. Court of Appeals for the Second Circuit (601 F. 2d 1225).

In petitioning this Court for a Writ of Certiorari, Petitioners have relied solely upon their argument that the statutes violate the Thirteenth Amendment, (Pet. p. 4).

OPINION BELOW

The U.S. Court of Appeals for the Second Circuit, in affirming the District Court determination and dismissing the action, held on the issue presented to this Court that:

> This Thirteenth Amendment argument simply does not conform to the Supreme Court's interpretations of the Thirteenth Amendment. The Court has never held that the Amendment itself, unaided by legislation as it is here, reaches the "badges and incidents" of slavery as well as the actual conditions of slavery and involuntary servitude. . (Citations) Indeed all indications are to the contrary. Notwithstanding Congress's broad authority to legislate under §2 of the Amendment, the Court has directly invoked the Amendment only to strike down state laws imposing the condition of peonage. (Citations) Moreover the Court has indicated that for purposes of judicial enforcement under the express prohibition of the Amendment itself-"[n]either slavery nor involuntary servitude. . .shall exist" the Court will define "slavery" narrowly . . .Abolition of the badges and incidents the Court has left to Congress. (Pet. 25A)

ARGUMENT

THE SEALED RECORD PROVISION OF NEW YORK ADOPTION LAWS DOES NOT VIOLATE THE 13TH AMENDMENT; FURTHER, THIS PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW BY THIS COURT

Petitioners have chosen to limit their arguments to those concerning the Thirteenth Amendment and its alleged applicability to this case. In doing so they have abandoned their Fourteenth Amendment arguments, as well as other arguments made below.

The crux of the Thirteenth Amendment claim is that the New York statues under challenge providing for sealing of adoption records and access only upon a showing of good cause, constitute a "badge" or "incident" of slavery and that such badge or incident is absolutely prohibited by the Thirteenth Amendment. Thus, claim Petitioners, it is neither necessary for Congress to pass additional legislation nor is there any balancing test whatever here.

Petitioners' analogy of slavery to adoption is faulty ab initio. It is based entirely upon analogizing the situation where a slave child was sold away from his parents and grew up separated from them and not knowing them, with an adoption situation, where, because of voluntary surrender by the parent(s), a judicial finding of mental illness or mental retardation of the parent(s), abandonment by the parent(s) or permanent neglect by the parent(s), as well as a separate judicial finding that adoption is in the best interests of the child, a youngster is adopted. (See N.Y.S. Social Services Law, §384-b stating the requirements for the freeing of children for adoption.)

There is simply no analogy between these two situations and no ground for treating adoption as slavery or any badge or incident thereof.

Petitioners rely upon "the second incident of slavery" which they have extracted from Senator Harlan's address in the 38th Congress. (Pet. pp. 16, 17)

Slavery, said Senator Harlan, robs the offspring of the care and attention of his enslaved parents, and destroys the guardianship of enslaved parent over his children. While this is quite evident, it is wholly without relevance to the claims petitioners assert. ¶ The fact remains that the enumerated badges of slavery were not eradicated by the Thirteenth Amendment per se and were never so intended. This is quite evident in the debates within the 38th and 39th Congress and is supported in the decisions of this Court.

a. The Congressional Debates.

Two facts clearly emerge from the Congressional debates: if the Congress which framed the Thirteenth Amendment intended to do anything more than abolish slavery and involuntary servitude the language it chose was certainly most inappropriate to achieve a larger purpose; and, secondly, the idea that the Thirteenth Amendment per se did any more than abolish slavery was repudiated by many Congressional leaders. Indeed, the adoption of the Fourteenth Amendment was based upon that rejection.

The debate in the House was opened by Representative James Wilson of Iowa who introduced the joint resolution to submit the proposed Thirteenth Amendment to the Legislatures of the States. Like Senator Harlan, Representative Wilson also recited the enormous evils and

deprivations of civil liberties which resulted from the institution of slavery. He noted that slavery "planted itself in opposition" to the privileges and immunities of the citizens of the several States, that slavery deprived the enslaved of the "great rights" enumerated in the First Amendment - -"[f]reedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition." Schwartz "Statutory History of the United States-Civil Rights"(hereinafter Schwartz)pp. 35-36. Do we count a denial of these privileges and liberties among the "badges of slavery"? Or do we confine badges of slavery to the five incidents which petitioners select from Senator Harlan's address? (Pet. 10A). Senator Trumbull also found First Amendment freedoms entrapped in the web of slavery. "If freedom of speech and of the press, so dear to the freeman everywhere, . . .has been denied us

all our lives in one half of the States of the Union, it was by reason of slavery." Schwartz, p. 54. And, in the 39th Congress he added the right to bear arms and the freedom to travel. Schwartz, p. 107.

Indeed, Senator Harlan himself recited not five but seven or more "incidents"of slavery, adding "as another incident of this institution . . . the suppression of freedom of speech and of the press" and the preclusion of "the practical possibility of maintaining schools for the education of many of the white race who have no means to provide for their own mental culture. It consequently degrades the white as well as the African race." Schwartz, pp. 73-74. While concluding that "none of these necessary incidents of slavery are desirable," ibid p. 74, nowhere did the Senator say that these undesirable

evils which slavery impressed upon the enslaved would be eradicated perforce of the Thirteenth Amendment alone.

If, as petitioners assert, badges of slavery were proscribed by the Thirteenth Amendment itself, if the badges and incidents encompass all the rights which Representative Wilson, Senator Harlan and Senator Trumbull recite, and if these badges are proscribed in a non-racial context (and this is precisely what petitioners claim), then they contradict what Slaughter-House Cases, 83 U.S 36 (1873) held, and what Twining v. New Jersey, 211 U.S. 78 (1908) reaffirmed, a rationale to which the United States Supreme Court has adhered down to this day.

Under petitioners' theory, and accepting all the incidents of slavery set forth in the Congressional debates, the Thirteenth Amendment incorporates the First Amendment and the Second Amendment, if not the entire Bill of Rights. It

incorporates the privileges and immunities of state citizenship, the right to travel, and the right to an education for those "who have not the means to provide for their own mental culture." Slaughter-House Cases refused to incorporate the Bill of Rights or the Article IV Privileges and Immunities Clause into either the Thirteenth Amendment or into the Fourteenth Amendment's Privileges and Immunities Clause. Petitioners' argument would indeed render the Fourteenth Amendment superfluous.

B. The Acts of Congress-The Court's Thirteenth Amendment Decisions

The Civil Rights Act of 1866, enacted by Congress pursuant to Section 2 of the Thirteenth Amendment and pursuant to the Necessary and Proper Clause of Article I, §8 of the Constitution, has come down to us at 42 U.S.C§ §1981 and 1982. §1981 reads,

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .

Section 1982 reads:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Suppression of those rights, the same rights as are enjoyed by white citizens, would constitute burdens and disabilities, badges and incidents of Negro slavery. Jones v. Mayer Co., 392 U.S. 409, 438-439(1968); ; Runyon v. McCrary, 427 U.S. 160, 179(1976). Petitioners argue that the Thirteenth Amendment, by its own unaided force and effect, abolished all incidents and badges of slavery and that these incidents and badges of slavery were abolished for all persons, whatever their race. They argued below that the Act of 1866 was simply intended and designed "to grant additional and more efficient and forceful implementation to that Amendment." Brief for Appellants, pp. 44-45,47. (Emphasis supplied). The Act of 1866 did more than create remedies and establish penalties. It gave the same right to sue, to be parties, to give evidence, to purchase, inherit, hold and convey real property.

These are substantive rights. These substantive provisions eradicated three of Senator Harlan's incidents and badges of slavery: incapacity to acquire and hold property, denial of status in the courts and "robbery" of the right to testify. These substantive provisions were debated for several months in the 39th Congress, several months after the Thirteenth Amendment had been ratified, by the very men who drafted that Amendment. Are we to assume, as Petitioners do, that these lengthy debates respecting these substantive provisions of the present §§1981 and 1982 were all a frolic and a banter on the part of the 39th Congress?

By its own unaided force and effect the Thirteenth Amendment abolished slavery and involuntary servitude and it abolished peonage, a form of involuntary servitude, as well. "If

Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void," Slaughter-House Cases, supra, 16 Wall. (83 U.S.) at 72, a construction confirmed in Hodges v. United States, 203 U.S. 1 (1906). But,"[w]hether or not the Amendment itself did any more than that . . .it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more." Jones v. Mayer Co., supra, 392 U.S. at 439. (Emphasis in original). The Enabling Clause clothed "Congress with the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Civil Rights Cases, 109 U.S. 3, 20(1883). (Emphasis added). This Court, nonetheless, has rejected over-extended conceptions of "involuntary servitude." The

denial of admission to public inns, restaurants and theatres and the segregation of races in public conveyances were held not to violate the Thirteenth Amendment. Civil Rights Cases, supra; Plessey v. Ferguson, 163 U.S. 537(1896). The segregation to which Homer Plessey was subjected on public transportation fell only on Fourteenth Amendment grounds in Brown v. Board of Education, 347 U.S. 483(1954); and both Plessey and Civil Rights Cases would fall today under the statutory weight of §1981 and the holding of Runyon v. McCrary, supra.

In no case has the Court ever suggested that the Thirteenth Amendment per se abolished anything more than slavery, involuntary servitude or peonage.

The badges and incidents of slavery are left for Congress to eradicate pursuant to the Enabling Clause of the Thirteenth Amendment and

the Necessary and Proper Clause of Article I, §8 of the Constitution. And that power to eradicate is vested in Congress only when the "badges" result from a system of slavery and are based upon a racial classification--a class as between whites and blacks (Runyon v. McCrary, supra) as set forth in §§1981 and 1982, and perhaps, too, as suggested in Slaughter-House Cases when those badges result from other systems of slavery and are based upon a classification of Mexicans and non-Mexicans or Chinese and non-Chinese.

If New York's qualified disclosure laws do not create a system of slavery or impose involuntary servitude or peonage--and obviously they do not--and if there is no racial discrimination in those laws or in their administration--and none has been alleged--those laws violate neither the

Thirteenth Amendment nor any statute enacted thereunder.*

Any doubt that this is so was resolved by this Court in Palmer v. Thompson, 403 U.S. 217, 226(1971) where the Court in rejecting a "faint and unpersuasive" argument that closing of a public pool violated the Thirteenth Amendment, based on an alleged " badge or incident" of slavery, held that such a reading of the Thirteenth Amendment "would severely stretch its short simple words and do violence to its history" and that the failure

*This Court has only recently reaffirmed the doctrine that the Thirteenth Amendment is limited to racially based claims of discrimination. In Chapman v. Houston Welfare Rights Organization, 99 S. Ct. 1905, 1918, —U.S.—(1979) the Court stated(FN 41): "The removal statue was enacted in the Civil Rights Act of 1866 under the authority of the Thirteenth Amendment. §1343(3) and(4) on the other hand, are based upon the authority of the Fourteenth Amendment which, unlike the Thirteenth Amendment, is not limited to racially based claims of inequality."

of Congress to pass "appropriate legislation" in this area precluded recourse to the Amendment.

B

Further, this petition does not present a substantial Federal question for review by this Court. Petitioners assert no conflict in the Circuits nor indeed of any judicial authority on this issue. In addition, adopted persons seeking disclosure of their background have invariably gone to the State Courts, and indeed the entire matter of adoption is one traditionally regulated by state statute. In New York, e.g., State Courts have granted access to records in certain situations where good cause has been shown and denied it in the absence thereof. .See, e.g. In Re Chattman, 57 A D 2d 618, 393 N.Y.S. 2d 768(App. Div..2nd Dept. 1977)(information about genetic conditions); In Re Maxtone-Graham, 90 Misc. 2d 107, 393 N.Y.S.

2d 835(Surr. Ct. 1975)(good cause not shown); In Re Anonymous, 92 Misc. 2d 224, 399 N.Y.S. 2d 857 (Surr. Ct. 1977)(aid in psychiatric or psychological treatment).

Thus none of the guidelines set forth in Rule 19 of the Rules of this Court are present here. While we recognize that these rules are neither controlling nor do they fully measure the Court's discretion, it is nevertheless noteworthy that such factors as guide the Court are wholly absent here.

CONCLUSION

The challenged statute is in all respects constitutional. Further, this Petition presents no substantial federal question.

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Respectfully submitted,

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